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No. 83-5209

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1982

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SUPREME COURT, U.S.

STEPHEN TODD BOOKER,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary of the Florida Department of Corrections,

Respondent.

PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION

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LOUIE L. WAINWRIGHT, Secretary,
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Corrections,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, STEPHEN TODD BOOKER, by and through his undersigned counsel respectfully requests that this Court consider the following statements in response to specific points raised in the Brief in Opposition filed by Respondent as follows:

1. At page 6 in the second paragraph, Respondent states: "However, in Petitioner's case, the Supreme Court of Florida found that 'the record does not conclusively show that the state attorney secured this information from the psychiatric reports.'" There was never any factual determination in that no hearing on this question was ever allowed by the trial court. Nevertheless, there was never any indication of another source

for this particular information used by the state attorney in cross-examination in the discovery granted in this case. It is important to note that counsel deposed every witness disclosed by discovery and had examined all evidence disclosed by discovery. If this particular information used by the state attorney came from a non-disclosed source, then there would be a clear discovery violation under Rule 3.220 of the Florida Rules of Criminal Procedure. Out of all the material on the record in this case, there is only one source for the material used by the state attorney in cross-examining the Petitioner and that was the court ordered psychiatric interviews.

2. At page 8 in the second paragraph, the Respondent states as follows:

"Respondent also disagrees with Petitioner's attempt to insert the issue of the reliability of Petitioner's admission on cross-examination that he had been convicted of numerous Article 15's while he was in the Army. These questions were not objected to at trial, and Petitioner's lawyer did not raise them on direct appeal or even in the federal district court. They were raised for the first time on rehearing in the Eleventh Circuit."

These questions were objected to and were the subject of a motion for mistrial at the trial court level. The nature of the objection involved an Estelle v. Smith, 451 U.S. 454 (1981) violation. Further, the reliability issue was raised specifically in a motion for new trial at the trial court level. Both of these matters were clearly raised from the outset.

When the Eleventh Circuit Court of Appeal ruled on the Estelle question, they rationalized under the decision in Harris v. New York, 401 U.S. 222 (1971), that the Petitioner's case did not have any merit. The Petitioner in response raised an argument to the Eleventh Circuit Court of Appeal's ruling, and did not raise a new issue.

3. On page 13 in the last sentence, the Respondent stated: "In the alternative, certiorari should be denied on this issue because the record refutes Petitioner's allegations that he was denied the opportunity to prevent non-statutory mitigating factors during the sentencing proceedings." It is assumed that the word "prevent" was a typographical error and Respondent meant to use present. The issue is not that of allowing a Petitioner to present mitigating circumstances but rather the issue is whether the jury thought they could consider such mitigating circumstances. The Respondent incorrectly construes the arguments raised by Petitioner.

4. On page 15, the Respondent states in the last sentence: "Unfortunately for Petitioner, as was pointed out in the federal district court as well as the Eleventh Circuit, he cannot even argue his record is silent because his record affirmatively shows that his trial counsel neither submitted or was aware of all the matters considered by the jury, the trial court, and the Supreme Court of Florida." The undersigned counsel is certainly familiar with what was considered by the jury and the trial court. However, it is quite the contrary when it comes to the Florida Supreme Court. The whole issue is that no one knows what non-record material the Florida Supreme Court considered. There are indications in the record that in some cases there was non-record material considered. The Florida Supreme Court, rather than describe what material they considered, decided to make a statement that it did not effect their consideration in any case. Counsel has no way of knowing at the present time what non-record material may have been considered by the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to LAWRENCE A KADEN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301, by U.S. Mail this 23rd day of September, 1983.

Stephen N. Bernstein

STEPHEN N. BERNSTEIN